Supreme Court, U. S.
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No. 80-968

IN THE

Supreme Court of the United States

OCTOBER TERM

Appeal from the Supreme Court of the State of Michigan

THE CITY OF DETROIT, a municipal corporation,
Plaintiff-Appellant,
v.
DETROIT POLICE OFFICERS ASSOCIATION, an unincorporated labor organization,
Appellee,
and
GEORGE E. BOWLES, AUBREY McCUTCHEON and WILLIAM L. KIRCHER,
Appellees,
and
DETROIT FIRE FIGHTERS ASSOCIATION,
Appellee.

MOTION TO DISMISS OR AFFIRM BY APPELLEE DETROIT FIRE FIGHTERS ASSOCIATION

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QUESTIONS PRESENTED

I. Whether appellant municipality, an agency of the State of Michigan, has standing to invoke the Fourteenth Amendment against the State.

II. Whether appellant states a federal due process claim for alleged improper delegation of state legislative authority.

III. Whether such issue was raised or decided below.

IV. Whether appellant states a federal equal protection claim for alleged denial of its citizens' "right to an effective vote," because of an arbitration statute providing for arbitration of municipal sector labor disputes.

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MOTION TO DISMISS OR AFFIRM BY APPELLEE DETROIT FIRE FIGHTERS ASSOCIATION

MOTION TO DISMISS OR AFFIRM

Appellee Detroit Fire Fighters Association moves the Court to dismiss the appeal herein on the grounds that appellant is without standing, the appeal does not present a substantial federal question, the "due process" federal question sought to be reviewed was not raised or passed on below, and the judgment rests on an adequate non-federal basis; or, in the alternative, moves to affirm on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

I.
THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity under the Fourteenth Amendment of Michigan's statute providing for the compulsory arbitration of unresolved labor disputes in municipal policy and fire departments. Michigan 1969 PA 312, as amended (1977); MCLA 423.231 et seq; MSA 17.455(31) et seq (Appendix E-1).

The statute provides that upon application of either the public employer or affected employees in a municipal police or fire department, unresolved labor disputes must generally be submitted to interest arbitration for resolution by a tri-partite panel chaired by an impartial arbitrator appointed from the Michigan Employment Relations Commission Panel of Arbitrators. The statute prescribes certain procedures and criteria for decision, and in the case of economic disputes requires selection by the arbitrator from between the parties' final proposals of that one which more nearly complies with the applicable statutory criteria.

B. The Proceedings Below

Pursuant to the statute, unresolved economic and other issues for the 1977-1980 period were submitted to arbitration by the parties. Contrary to the appellant's characterization of the principal issue before the arbitrator as reviewed by the courts below, that issue was simply "whether the city's last best offer of *elimination* of the already existing police officers' cost of living program plus wage increases over a three-year period of 4.8%, 4% and 4% more nearly complied with the applicable legislative standards than did the defendant Detroit Police Officers Association's ('DPOA') last best offer of *continuation* of the already existing cost of living program and the somewhat *lower* wage increases of 4.5%, 4% and 3.5% over a three-year

period." 408 Mich. 410, 435 (A-26) (emphasis by Michigan Supreme Court). The arbitration panel (the City's delegate dissenting) voted to retain the cost of living allowance clause and to award the lower pay increases proposed by the Union.

The City challenged the award essentially on state grounds, of purported improper delegation of legislative authority to a "politically unaccountable" person and of alleged insufficiency of the record to support the award. The trial court upheld the award and the Michigan Supreme Court affirmed.

II.
ARGUMENT

This case was tried and decided below on state grounds. The Michigan Supreme Court concluded that Michigan, like a score of other states, could validly effectuate its state labor policy of prescribing in the municipal police and fire sectors, in lieu of strikes, that unresolved labor disputes be submitted to interest arbitration, under prescribed standards and procedures.

This appeal is without merit and the Court is without jurisdiction. Appellant, a creature of the State, is without standing to assert the alleged Fourteenth Amendment issues; there is no merit to the alleged federal "due process" or "standards" claim; that claim was never asserted below; and the alleged "equal protection/effective vote" claim, although advanced below, is similarly without standing or merit.

A.
Appellant City Is Without Standing To Raise the Alleged Fourteenth Amendment Issues.

It is well established that political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment. *Williams* v. *Mayor and City Council of Baltimore*, 389 U.S. 36, 40 (1933); *Newark* v. *New Jersey*, 262 U.S. 192, 196 (1923); *Trenton* v. *New Jersey*, 262 U.S. 182, 188 (1923); *City of New York* v. *Richardson*, 473 F.2d 923, 929

(C.A. 2, 1973), *cert den* 412 U.S. 950 (1973); *City of South Lake Tahoe* v. *California Tahoe*, 625 F. 2d 231 (C.A. 9, 1980).

Consequently, appellant is without standing to raise the alleged Fourteenth Amendment issues herein.

B.

The Question of Delegation of Legislative Authority Or Of Allocation Of State Powers Does Not Present a Federal Question.

The first of the two alleged federal issues raised by appellant, namely, of alleged improper delegation of legislative authority in purported violation of federal due process rights, does not in fact present a federal question. The delegation or standards issue instead "is a question of state law the decision of which by the State's highest court is binding upon us." *Neblett* v. *Carpenter*, 305 U.S. 297, 302 (1938), rehearing denied (1939). *Accord: O'Neill* v. *Leamer*, 239 U.S. 244 (1915); *Erie R. Co.* v. *Public Utility Commissioners*, 254 U.S. 394 (1921); *Welch* v. *Swasey*, 214 U.S. 91 (1909); *Ohio ex rel Bryant* v. *Akron Metropolitan Park District*, 281 U.S. 74 (1930).

Similarly, separation of powers principles which may be applicable to the federal government are not enforceable under the U.S. Constitution against the states. *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902); *Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 n 13 (1974).

> "This Court has often recognized that political subdivisions such as cities and counties are created by the State 'as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.' *Hunter* v. *Pittsburgh* 207 U.S. 161, 178." *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 71 (1978).

Hunter concluded that: "The state, therefore, at its pleasure, may modify or withdraw all such powers," at 178, without being answerable under the Fourteenth Amendment. This Court noted in *Holt* that *Hunter* "continues to have substantial

constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various type[s] of political subdivisions and conferring authority upon them." 439 U.S. 60, 71.

Plainly, a claim of improper delegation of legislative authority for alleged insufficiency of standards or otherwise does not state a federal cause of action.

C.

No Federal Due Process Issue Was Ever Urged Below.

Not only does a due process claim of an improper state delegation of legislative authority fail to state a federal substantive cause of action, but such a claim was never asserted below as, of course, for jurisdictional purposes here it must have been.

Contrary to the misleading statements in appellant's Jurisdictional Statement, the alleged improper delegation argument was raised as a *state* issue, the only federal issue asserted being the alleged "equal protection" argument (discussed below, part D)[1]. Plaintiff-appellant's brief on appeal to the Michigan Supreme Court focused on an alleged "Unconstitutional Delegation Of Legislative and Political Authority To Ad Hoc Arbitrators" (Plaintiff's Brief on Appeal, 15) in a section which raised no federal issues whatever. Only in a separate section of the brief was an alleged federal equal protection, not due process, theory urged: "The Act Violates The Equal Protection Clauses Of The Constitutions Of The United States And Of The State Of Michigan In That It Deprives The Citizens Of The Affected Municipal Constituencies Of Their Right To Cast Effective Ballots In Municipal Elections." (Brief on Appeal, part II-C, p. 19).

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[1]Although the City's trial court Complaint adverted vaguely "to the requirements of the Constitution of the United States and the State of Michigan" (B-105-106), the only specific references were to State Constitutional provisions. Moreover, no "unconstitutionality" arguments were ever briefed or argued to the trial court.

Moreover, no Justice of the Michigan Supreme Court identified any federal due process issue, much less finding merit therein. The Court's perception of the issues as presented by the City involved two distinct *State* questions: "(1) whether Act 312, as amended, is violative of the *Michigan* delegation doctrine in general as framed by the 'standards test' of *Osius* v. *St. Clair Shores*, 344 Mich 693, 698; 75 NW 2d 25 (1956); and (2) whether Act 312, as amended, is violative of general notions of public accountability or political responsibility." 408 Mich. 410, 445 n 12 (A-36). (Emphasis added)[2].

Unlike the City's Jurisdictional Statement, its "unlawful delegation" argument below, even on state grounds, did not focus on any alleged inadequacy of *standards*. In fact, found the Michigan Supreme Court, the City tacitly conceded the adequacy of the statutory standards or criteria. 408 Mich. 410, 462, n 33. (A-53)[3].

Indeed, on its motion for rehearing, the City criticized the Michigan Supreme Court for having failed to comprehend that its argument was *not* an attack on the alleged inadequacy of the statutory criteria [much less on a federal due process basis], but on the purported inappropriateness of the official to whom the delegation of authority was made:

> "Lastly, the majority held that political accountability exists under Act 312 because the critieria of Sec. 9 of the Act meet the standards enunciated in *Osius* v. *St. Clair Shores*, 344 Mich 693, 75 NW 2d 25. [¶] But *Osius, supra*, dealt solely with the issue of whether the criteria (or standards) which are to guide a delegated public body or official in administrative proceedings are as precise as constitutionally required. *The instant issue is not*

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[2]The dissent similarly perceived the delegation issue in State terms. 408 Mich. 410, 517 n. 16. (A-108).

[3]"33. The precision of these standards appears to have been tacitly conceded by the city as it merely attacks the relative weight to be given the §9 factors rather than their sufficiency. The city's argument in this respect is discussed and rejected in Part V, B, *infra*."

> *whether the standards are sufficiently precise*, but whether the 'official' is appropriate to make the decision — regardless of the standards." (Emphasis added). City's Brief is Support of Motion For Rehearing before Michigan Supreme Court, pp. 16-17.[4]

In summary, no federal due process argument was ever raised below, nor even a state argument that the statutory criteria or standards were insufficient. The only delegation argument ever pursued below by the City was that there was an allegedly improper delegation to "politically unaccountable" persons in alleged violation of the State Constitution. The majority of the Michigan Supreme Court disagreed. No federal question on the issue was ever considered or passed upon below.[5]

D.

Appellant's "Equal Protection"/"Effective Vote" Claim Is Without Merit.

The only federal issue in fact urged below was the alleged "equal protection" argument that Detroit voters were deprived of the "right to cast effective ballots" by virtue of the decisional authority given to the Act 312 arbitrator. The argument is frivolous and was unanimously rejected below. 408 Mich. 410, 437 n. 5 (A-28) and 446 n. 15 (A-37).

Only two brief responses to the "equal protection/effective vote" argument of the City need be made.

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[4]The City footnoted the word "issue" in the quoted sentence by saying, "That is, in this section of the brief." But that was the only section of the brief on rehearing which purported to deal with any alleged federal delegation question and then only in the caption, but not the text. Of course, federal issues may not be timely raised by first being submitted on application for rehearing. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945); *Hanson* v. *Denckla*, 357 U.S. 235, 243-244 (1958).

[5]All members of the Michigan Supreme Court, both in the original case considering the constitutionality of Act 312, *Dearborn Fire Fighters* v. *Dearborn*, 394 Mich. 229 (1975), and in the present case, agreed as to the sufficiency of the statutory standards, 408 Mich 410, 462 n 34 (A-53), as have courts of other jurisdictions, summarized in the majority opinion at 408 Mich 410, 465 notes 39 and 40 (A-56).

First, not only does the City lack standing to raise Fourteenth Amendment issues against the State generally (part A, *supra*) but it specifically has no standing to assert the personal "voting rights" of its citizens. *Baker* v. *Carr*, 369 U.S. 186, 204-208 (1962) (cf. note 23); *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964).

Secondly, the claim is totally devoid of merit.

The "one-man, one vote" cases merely require that legislative districts have substantially equal numbers of citizens, in order to preclude debasement of the vote. Here, no claim of unequally-populated districts is or could be made. Further, the cases make clear that the "one-man, one-vote" principle is simply inapplicable to appointive or non-legislative officials. "Since the choice of members of the county school board did not involve an election and since none was required for these non-legislative offices, the principle of 'one man, one vote' has no relevancy. *Sailors* v. *Kent Board of Education*, 387 U.S. 105, 111 (1967) (appointed school board members in Michigan). See also, *Fortson* v. *Morris*, 385 U.S. 231 (1966) (Georgia governor selected by its legislature: "Not a word in the Court's opinion [in an earlier apportionment case, *Gray* v. *Sanders*, 372 U.S. 368] indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than selections by appointment or elections by the State Assembly." 385 U.S. 231, 233); *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970): "We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws." *Id*, 397 U.S. 50, 58, citing *Sailors*, *supra*; *Wells* v. *Edwards*, 409 U.S. 1095 (1973) (election of state supreme court justices from districts without regard to population).

Moreover, equal protection arguments against binding arbitration laws, similar to those here made, have been rejected by the courts as lacking merit, *Harney* v. *Russo*, 435 Pa. 183, 255 A. 2d 560 (1969); *City of Amsterdam* v. *Helsby*, 37 N.Y. 2d 19, 332 N.E. 2d 290 (1975); *Town of Arlington* v. *Board of Conciliation and Arbitration*, 370 Mass. 769, 352 N.E. 2d 914 (1976), as noted by the Court below. 410 Mich. 410, 439 n. 5 (A-28) and 446 n. 15 (A-37).

Far from applying the "one man, one vote" principle to such circumstances as these, this Court has disclaimed doing so. In the very case relied on by appellant, *Avery* v. *Midland County*, 390 U.S. 474 (1968), the Court concluded:

> "The Sailors and Dusch cases [*Dusch* v *Davis*, 387 US 112 (1967) and *Sailors* v Board of Education, 387 US 105 (1967)] demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called 'the emergency of a new ideology and structure of public bodies, equipped with new capacities and motivations . . .' R. Wood, 1400 Governments, at 175 (1961). Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." *Avery* v. *Midland County*, 390 U.S. 474, 485-486.

CONCLUSION

WHEREFORE, appellee submits that the questions upon which this cause depends are so unsubstantial as not to need further argument and appellee respectfully moves the Court to dismiss this appeal or in the alternative to affirm the judgment entered in this cause by the Supreme Court of Michigan.[6]

Respectfully submitted,

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[6]An unsubtle theme pervades the appellant's Jurisdictional Statement that there was some race issue below. In fact, none was asserted and none exists. Furthermore, the backhanded innuendo, through *disclaimer* "that PA 312 is unconstitutional bacause enacted to discriminate against the black Mayor, and predominantly black city council and population of Detroit" (Jurisdictional Statement, 21), is gratuitous. The Act is of state-wide application and when enacted in 1969 was supported by, among others, the current black Mayor of Detroit, then a State Senator.